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In The

Supreme Court of the United States

MYLES TAMASHIRO, *et al.*,

Petitioners

v.

DEPARTMENT OF HUMAN SERVICES,
STATE OF HAWAI'I, *et al.*

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawai'i

REPLY BRIEF

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REPLY BRIEF

Respondents can point to no authority that supports the decision below. That is because there is none. No federal or state court, no federal or state regulator, not even a state legislature has adopted such a glaring misreading of the federal Randolph-Sheppard Act. To the contrary, these bodies have universally understood that the Randolph-Sheppard Act does *not* impose the *exclusive* means for a blind vendor to challenge a State's violation of state law. That understanding of the federal statute is consistent with foundational canons of statutory construction reflecting the importance of federalism. It is also consistent with the actions of the federal Department of Education.

Respondents are wrong that the decision below rests on an independent and adequate state law ground. The Hawai'i Supreme Court explained that its interpretation of the federal Randolph-Sheppard Act and state law were "closely intertwined," Pet. App. 56a n.24, because the court believed that the state agency had incorporated into its own regulations what federal law "mandated," *id.* at 40a-41a n.21. When the erroneous reading of federal law is removed, nothing remains to support the decision below.

If left unreviewed, the decision below will have nationwide implications even if followed by no other state court. As explained by the brief of the Randolph-Sheppard Vendors of America, the American Council of the Blind, and the National Education and Legal Defense Services for the Blind as *amicus curiae*, the ruling will inappropriately force additional state disputes into the federal arbitration scheme and thereby will increase the risk of erroneous determinations of state law and delay resolution of disputes that are properly before the arbitrators. RSVA *Amicus* Br. 5-6. This, in turn, may discourage blind vendors from seeking any redress for state violations of state law, despite the fact that States intentionally created remedial schemes distinct from that in the Randolph-Sheppard Act itself in order to redress violations of state law. *Id.* at 6-7.

Moreover, the decision will deprive a state-operated trust fund of almost $4 million that the trial court determined was withheld from that fund in violation of state law and that will be used to pay for, *inter alia*, retirement benefits not just for the named plaintiffs but for all eligible blind vendors. Pet. App. 119a-120a. This case is a particularly good vehicle to resolve this important issue because the majority and dissent below thoroughly surveyed the relevant arguments.

A. The Decision Below Is Contrary To The Legislative Enactments, Administrative Regulations, Or Judicial Opinions Of At Least A Dozen Other States As Well As The Decisions Of Federal Courts Of Appeals

Respondents do not dispute that no other state court has reached the result adopted in this case by the closely-divided Hawai'i Supreme Court. As the petition demonstrates (Pet. 16), four state courts, including one Supreme Court and two intermediate appellate courts, have adjudicated claims by blind vendors claiming that their States have violated state laws. Other than noting that those decisions were decided in the 1980s (Br. in Opp. 10 n.3), respondents do not deny that their reading of the Randolph-Sheppard Act, adopted by the Hawai'i Supreme Court, would have required each of those cases to be dismissed and each of those plaintiffs to seek relief in a federally-convened arbitration proceeding. The absence of other reported opinions does not mean that such litigation is not proceeding in state courts. To the contrary, as *amici* explain, many suits by blind vendors alleging state violations of state law are routinely adjudicated in state court. RSVA *Amicus* Br. 6.

Further, respondents do not dispute that at least five States have enacted laws, and four other States have promulgated regulations, that expressly authorize blind vendors to rely on state courts to vindicate their state law rights against the State. Pet. 15-17. Respondents, in fact, appear to acknowledge that these States have "express[ed]" a "preference as a matter of state law" for state court adjudication of such claims. Br. in Opp. 10. Yet respondents' argument that the Hawai'i Supreme Court was "correct on the

merits" in concluding that "federal law requires participating states to adopt the hearing-arbitration-review procedure," *id.* at 6, 10-11, necessarily would lead to the preemption of remedial schemes used in those nine other States.

New Hampshire v. Ramsey, 366 F.3d 1 (1st Cir. 2004), demonstrates that the instant case would yield a different result in the First Circuit. That court held that the Randolph-Sheppard Act remedial procedures applied in that case, which involved vending machines on state property, only because an applicable federal transportation statute expressly incorporated those procedures. *Id.* at 11. The court of appeals contrasted that special situation with the typical situation, such as this, in which state agencies grant licenses to blind vendors on "state property under the state[]" law, to which the Randolph-Sheppard Act procedures do *not* apply. *Id.* at 23 n.23.

B. The Statutory Interpretation Adopted By The Court Below Disregards Both This Court's Clear Statement Rules And Requirement Of Deference To Federal Agencies

Respondents urge (Br. in Opp. 10-14) that the decision below was a correct interpretation of the federal statute and the federal Department of Education regulations. But respondents can point to no text that requires state law claims to be resolved exclusively within the federal remedial scheme. Rather, respondents ask this Court to assume that Congress intended States to abandon their own remedial procedures when addressing state law violations arising from their own property, even though Congress never required States to make those properties available to blind vendors in the first instance. Respondents' non-textual construction of federal law ignores the clear statement rules that apply to interpretation of that statute both because of the Randolph-Sheppard Act's effect on the traditional federal-state balance as well as its preemption of state common law remedies. They also disregard the actions of the federal agency charged by Congress with implementing the federal statute, which are entitled to deference.

1. Respondents' efforts to defend the decision below (Br. in Opp. 11-13) are unavailing. Contrary to respondents' assertion (*id.* at 13 n.6), the federal regulatory definition of "program" to mean "all the activities of the licensing agency under this part related to vending facilities on Federal and other property," 34 C.F.R. § 395.1(p), confirms that the relevant activities that constitute the "vending facility program," 20 U.S.C. § 107b(6), for which arbitration is available are those activities governed "under this part," *i.e.* under the federal regulations implementing the federal Randolph-Sheppard Act. The activities under the Randolph-Sheppard Act do not include any additional, optional program adopted by the state agency designated as the licensing agency. As the petition explained (Pet. 18-19), the federal statutory reference to "other property" in 20 U.S.C. § 107a(a)(5), does not expand the critical term "vending facility program" to include properties that the State elects, at its discretion, to make available to blind vendors.

Respondents also err in suggesting (Br. in Opp. 11-13) that forcing all blind licensees down a single remedial path is efficient. That suggestion assumes that respondents' obligations to a licensee are the same regardless of whether the licensee is vending at a federal or state property. But they need not be. The legal basis of a licensee's grievance is determined by whether the licensee is (or is seeking to be) a vendor at a federal property, in which case the rights emanate from the Randolph-Sheppard Act, or a vendor at a non-federal property, in which case the rights emanate from state law. For example, federal regulations place a cap on the amount of money a blind vendor who operates on "Federal property" can obtain from vending machines located on "such Federal property," 34 C.F.R. § 395.8(a), but state regulations impose no such limit on the amount a blind vendor who operates on "state, city, or county property" is entitled to from a vending machine that is located on such property, Haw. Admin. Rules § 17-402-17(n)(2).

As the Federal Circuit explained in *Kentucky v. United States*, 424 F.3d 1222 (Fed. Cir. 2005), because the federal Department of Education and federal courts have

no "special expertise" regarding state law, it would be "odd" to interpret the federal statute to force blind vendors into federally-convened arbitration even if their complaints have nothing to do with violations of the federal Randolph-Sheppard Act. *Id.* at 1226.

2. Respondents argue that there is no federalism concern in this case, and thus no need for a clear statement, because Hawai'i has a "sovereign preference" for the federal "hearing-arbitration-review procedure" rather than civil litigation in its own courts. Br. in Opp. 6, 10. But federalism, and the canons of statutory construction that further its goals, are not intended simply to protect States when they think it opportune. The Constitution "divides authority between federal and state governments for the protection of individuals," "not * * * for the benefit of the States." *New York v. United States*, 505 U.S. 144, 181-182 (1992). Individuals are thus free to invoke federalism's protections even if their State expediently abandons its general defense of federalism in order to prevail in a particular case.

Respondents' expedient avoidance of the relevant canons of construction becomes even more evident when searching for their response to the point (Pet. 22) that a clear statement is required to overcome the presumption against preemption of state common law claims, such as petitioners' contract and breach of fiduciary claims in this case. Respondents are silent in their brief in opposition on this clear statement rule. That is likely because Hawai'i has consistently urged application of the clear statement rule in preemption cases.[1]

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[1] See, for example, the following *amicus curiae* briefs filed on behalf of the State of Hawai'i: *Amicus* Br. of 19 States at 7, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006) (No. 04-1371) ("Because SLUSA alters the longstanding shared authority of federal and state governments to address securities fraud and limits the recourse available to injured investors, the scope of SLUSA's preemption must be informed by a strong presumption against preemption."); *Amicus* Br. of 17 States at 6, *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (No. 01-706) ("Even outside the health and

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3. Respondents' reading of the statute is inconsistent with the federal administrative interpretation issued contemporaneously with the enactment of the federal arbitration provision in 1974, which is entitled to great deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and its progeny. As noted in the petition (Pet. 22-23), the Department of Education's predecessor expressly refused, at the conclusion of notice-and-comment rulemaking, to regulate the States' "hearing procedures" for vendors located on non-federal property and left the treatment of those vendors to the discretion of the State licensing agencies.

Respondents' only retort (Br. in Opp. 14 n.8) is that the Department's regulations also acknowledged that, in some instances, blind vendors operating facilities on "other property" fell within the scope of the Randolph-Sheppard Act. But respondents point to nothing in those regulations that state that the arbitration procedures of the Randolph-Sheppard Act were intended to be the exclusive remedy for all blind vendors licensed by a State licensing agency, which is the position of the Hawai'i Supreme Court that respondents defend. *See also* RSVA *Amicus* Br. 10-12 & n.2 (discussing absence of such regulatory history).

Furthermore, the federal Department of Education designated the relevant state agencies in Arizona, Colorado, Kentucky, and Ohio as State licensing agencies under the Randolph-Sheppard Act, all of which have regulations that expressly acknowledge that a blind vendor may elect to seek recourse either through state law *or* the federal process set forth in the Randolph-Sheppard Act. Pet. 17. In order for a state agency to receive such a designation, the Department of Education was required to determine that the state agency's regulations comply with

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safety context, this Court has declined to affirm preemption unless it finds 'an unambiguous congressional mandate' to preempt state law. Ambiguity is not tolerated; 'pre-emption will not lie unless it is the "clear and manifest purpose of Congress."'" (citations omitted)).

the federal statute. *See* 20 U.S.C. § 107a(a)(1); 34 C.F.R. § 395.4(a). "The only logical conclusion, therefore, is that state court review of a disputed evidentiary hearing is acceptable under the federal [Randolph-Sheppard Act] as interpreted by" the federal Department of Education. Pet. App. 92a (Pollack, J., dissenting). This determination is likewise entitled to deference.

Respondents are in error when they suggest (Br. in Opp. 13-14 & n.7) that the Department's convening of arbitration panels to resolve disputes involving blind vendors on non-federal property supports their interpretation of the statute. None of those actions, which apparently are performed by a low-level agency employee, address the authority to resolve the rights of blind vendors on non-federal property and thus are not entitled to any deference on that point. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) ("drive-by jurisdictional rulings" in which Court assumes, but does not actually address whether, it has jurisdiction, "have no precedential effect"). Moreover, the convening of arbitration panels could, at most, support the proposition that the federal arbitration scheme is one remedy available to blind state vendors, *see* Pet. 23-24, not that it is the exclusive remedy, as the Hawai'i Supreme Court ruled below.

Although the actions of the Department of Education in this area support petitioners' interpretation, should there be any doubt, seeking the views of the Solicitor General of the United States would confirm the error of the court below and the importance of this issue to the Randolph-Sheppard Act and its beneficiaries.

C. The Court Below Could Not Have Reached The Same Result Under State Law Independent Of Its Manifestly Erroneous Reading Of Federal Law

Respondents acknowledge that the "first half" of the decision below "holds that federal law requires" blind vendors to rely exclusively on the federal arbitration to obtain any remedy for their state law claims. Br. in Opp. 6. Respondents assert, however, that the decision below also rests on the

ground that state law independently requires utilization of federally-convened arbitration and eliminates all state law remedies. Br. in Opp. 6-7, 9, 10, 13. The Hawai'i Supreme Court did not so hold, and respondents' efforts to press a revisionist view of the decision are futile.

Respondents' claim that the "second half" of the decision below is "separately" based upon state law is not true. Br. in Opp. 6-7 (citing Pet. App. 33a-48a). Rather, that portion of the Hawai'i Supreme Court's decision engages in a "[r]eview of the Hawai'i RSA" that "further confirms [its] conclusion" that "the federal RSA mandates that participating states, like Hawai'i, acknowledge and accept the federal adjudication path." Pet. App. 33a. State law, the court reasoned, must be read to incorporate the federal requirement that blind vendors on non-federal property utilize federally-convened arbitration in order to "acknowledge[] its obligation to the United States" under the Randolph-Sheppard Act. *Id.* at 39a; *see also id.* at 40a-41a n.21 (describing requirement as "mandated" by Congress and then "incorporated" within respondents' rules).[2]

Indeed, in the concluding portion of the opinion (a portion ignored by respondents), the court discussed in detail the federal case law interpreting the Randolph-Sheppard Act and reiterated that its holding was "based on [its] examination of the overall scheme of the federal RSA and its relationship to the Hawai'i RSA." *Id.* at 57a. It overruled a sixteen-year-old Hawai'i Supreme Court case that had held that state courts had jurisdiction over a suit by a blind vendor at a non-federal property suing under Hawai'i's blind vendor statute because that case did not contain an "examination of the interplay between the federal and the Hawai'i RSAs." *Id.* at 58a. Under these circumstances, the

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[2] Significantly, this was also the view of respondents below. They explained: "The Adjudication Path is no less a federal law for its reiteration in the Hawaii Administrative Rules at the express direction of Congress. * * * The State of Hawaii's agreement with the United States to reproduce federally-required remedies [in its regulations] does not change their essential character as congressional enactments." Resp. Haw. Sup. Ct. Opening Br. 38.

court's judgment clearly was not independent of its reading of federal law. *See Oregon v. Guzek*, 546 U.S. 517, 521 (2006) (exercising jurisdiction because the state court "held that state law demanded 'admissibility' solely for a federal reason").

The court below described the state law it was interpreting as "closely intertwined" with the federal Randolph-Sheppard Act. Pet. App. 56a n.24. Respondents ultimately acknowledge as much, because the best argument they can muster is that the state court's holding involves a "complex interplay of federal and state law." Br. in Opp. 6. But that interplay demonstrates that state law is not sufficiently adequate or independent to sustain the judgment below. *See Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983) (when "a state court decision fairly appears to rest primarily on federal law, *or be interwoven with federal law*," then this Court has jurisdiction because it presumes that "the state court decided the way it did because it believed that federal law required it to do so" (emphasis added)).

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition for a writ of *certiorari*, the petition should be granted.

Respectfully submitted,

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